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No. 86-167

IN THE

Supreme Court Of The United States

October Term, 1986

AMERICAN CAST IRON PIPE COMPANY,

Petitioner

vs.

ANNETTE COX, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

The district court found as a fact that the defendant established and maintained a pattern and practice of sexual segregation of its workforce through a "policy of reserving plant clerical jobs for men". 585 F.Supp. at 1158. This finding was completely supported by the evidence and has not been challenged by the defendant. The Court of Appeals reiterated the facts as follows:

> In the action before us it is undisputed that the defendant had a policy of overt workforce sex segregation. Before December 1973 ACIPCO deliberately reserved clerical jobs in its all-male production plant for men. The non-plant clerical jobs paid less than the plant clerical jobs.

> Only after this suit was filed did defendant allow a few women to make their way into the plant. Outside the plant, women were also kept on the lowest level of the workforce and paid the least.
>
> The defendant maintained this discriminatory system through word of mouth hiring. There was no posting or announcing of vacancies in salaried jobs. There were also no bid systems or formal applications for these jobs, and no written criteria for selection — the system was entirely one of subjective evaluation. Hourly job openings were sometimes posted, but only in the plant where women, of course, could not see them. In short, sex discrimination at ACIPCO was pervasive and overt.

Despite the evidence of a common "policy of reserving plant clerical jobs for men" which resulted in "pervasive and overt" sex discrimination, the district court decertified the class after the judge who had originally certified it resigned to return to private practice and was replaced by a newly appointed district judge in 1982. (App. 6-20). The Court of Appeals reversed the decertification because of a series of abuses of discretion by the district court in 1983 which need not be reiterated again for present purposes. (App. 6-20).

The defendant has not challenged the reversal of the decertification of the class or any other part of the substantive rulings by the Court of Appeals in its request for issuance of a writ of certiorari in this Court. That ruling by the Court of Appeals reinstated a class of 240 women employees of the defendant. (App. 8). The defendant has limited the relief it seeks in the current proceedings to dismissal of the separate appeal of 18 of the 240 class members. Pet., p. 15. The defendant has not challenged the Court of Appeals' jurisdiction of the remaining 222 members of the class, one of whom was one of the two class representatives, Brenda Morgan.[1] Because

[1]There were two named individual plaintiffs who were certified as class representatives, Annette Cox and Brenda Morgan. (App. 8). A third named plaintiff, Joyce Pandellis, was not certified as a class representative. (App. 8). One of the class representatives, Brenda Morgan, was one of the three prevailing class members awarded back-pay who filed the unchallenged appeal in No. 84-7462. (App. 2 n.1, 8-9, 26-28). The other

it is undisputed that the class representative timely and properly appealed on behalf of the class after *all* post-trial motions were denied, the unchallenged notice of appeal filed by class representative Brenda Morgan also preserved the appellate rights of the 18 class members challenged by the defendant in its Petition in this Court in the same way that the class representative's notice of appeal preserved the appellate rights of the other 222 members of the class. The Court of Appeals specifically remanded the claims of the 18 challenged class members for participation *as class members in a classwide trial* of the "pattern and practice" of discrimination. (App. 26). Only 3 of the 222 class members who have not been challenged jurisdictionally in the defendant's Petition to this Court filed any notice of appeal, and yet all 222 will be permitted to participate in the classwide trial on remand.

The Court of Appeals rejected the defendant's jurisdictional challenge to the appellate rights of the 18 "non-prevailing" class members because those class members timely filed a notice of appeal on their own behalf within 30 days after a judgment was entered against them under F. R. Civ. P. 54 (b) which certified that there "was no just reason" for delay of an appeal by those 18 class members as to their challenge to the underlying judgment against them. The Rule 54 (b) judgment was entered *after* all of the Rule 59 motions were filed and it disposed of all such motions directed to the judgment against the 18 non-prevailing class members. (App. 55). There were no motions filed after the 54 (b) judgment which suspended the time for appeal from that judgment. As with all Rule

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class representative was one of the 18 class members who were denied back-pay. (App. 20). The remaining 237 members of the class were not named plaintiffs. Of these 237, 18 class members presented claims for back-pay, 123 class members were not permitted to present claims because of the abusive opt-out procedure which was reversed by the Court of Appeals, another 70 class members were not permitted to present claims because of the abusive discovery sanctions which were reversed by the Court of Appeals and the remaining 26 class members elected not to participate in the individualized trials because of the onerous nature of such proceedings. (App. 10-17).

54 (b) judgments, there were parties and issues other than those included in the 54 (b) judgment which were left pending in the trial court, but none of those were addressed to the 18 non-prevailing class members except for the defendant's request for the assessment of fees and costs against such class members and the defendant's opposition to the assessment of fees and costs against it. (App. 52-53). The Court of Appeals held that the latter motion was not one which should operate to suspend the time for appeal from the original underlying judgment against the 18 class members or from the subsequent Rule 54 (b) judgment because issues concerning fees and costs were not capable of upsetting the judgment against the 18 class members. Nor was such motion capable of creating a situation where the validity of the underlying judgment against the 18 class members on the merits was being reviewed simultaneously in the Court of Appeals and the trial court. (App. 4-6). The same result is dictated by Rule 54 (b) which expressly permits entry of judgments against less than all the parties and/or less than all the issues.

The Rule 54 (b) judgment against the 18 class members was entered on May 21, 1984 and those class members appealed from that judgment on June 7, 1984. (App. 55-57). On June 14, 1984 judgment was entered as to all the remaining parties and issues and the class representative, Brenda Morgan, appealed from that judgment on July 3, 1984. (App. 58-60). There has never been any allegation by the defendant that it was prejudiced by these events, nor could there be. Neither was there ever any challenge to the Rule 54 (b) judgment in the trial court by any party.

REASONS FOR DENYING THE WRIT

The decision of the Court below does not conflict with prior precedent in this or any other Court. None of the prior precedent relied upon by the Petitioner involved a Notice of Appeal filed *after* denial of the Rule 59 motion and *after* that denial was embodied in a new judgment entered pursuant to F. R.

Civ. P. 54 (b) as to less than all the parties and less than all the issues. The claim of conflict by the Petitioner is mere hyperbole. The decision of the Court below is an unexceptional application of the obvious content and wording of F. R. Civ. P. 54 (b) and F. R. App. 4 (a) (4) which allow the entry of appealable judgments as to less than all the parties and less than all the issues. The question deserves no further belaboring by the courts. Even if this were not true, the question presented is moot because of the *unchallenged* Notice of Appeal by the class representative in a separate appeal which tolled the time for appeal and obviated the need for separate Notices of Appeal for all of the 240 members of the class, including the 18 who are challenged in the current proceedings.

I. The Challenge To The Appeal By 18 Class Members Is Rendered Moot By The Unchallenged Appeal On Behalf Of The Class By The Class Representative

The defendant's challenge to the appeal by the 18 non-prevailing class members is rendered moot by the unchallenged appeal filed by the class representative, Brenda Morgan, on behalf of herself and the class that was erroneously decertified by the trial court. The defendant does not challenge the Court of Appeals jurisdiction over the class claims or the individual claims of the class representative, Brenda Morgan, because it concedes that she timely appealed from the interlocutory decertification of the class[2] and the final judgment on the merits *after all post-judgment motions were denied.* (App. 60). The only relief that is sought in the Petition For Writ Of Certiorari

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[2]The class certification and decertification orders were interlocutory and unappealable until a final judgment on the merits was entered. All interlocutory orders are merged in the final judgment and appeal from such a final judgment includes all prior interlocutory orders. *Moore's Federal Practice,* Vol. 9, Par. 203.18, p. 3-80 ["An appeal from the final judgment draws in question all prior non-final orders and all rulings which produce the judgment. Having thus appealed from the judgment, the appellant is then free to attack any part of it in his brief, or any prior non-final order or ruling leading up to it".].

is dismissal of the separate appeal filed by the 18 class members who participated in the trial on the merits. Pet., p. 15. The defendant seeks no such dismissal or any other relief as to the other 222 members of the class benefitted by the appellate reversal of the decertification of the class. *Id.* The 18 class members which the defendant seeks to have dismissed should not be held to be in any different posture than the other 222 class members because both groups were equally protected by the unchallenged notice of appeal filed by the class representative, Brenda Morgan, after the denial of *all* Rule 59 motions. The Court of Appeals specifically reinstated the 18 non-prevailing class members to the class and remanded their claims for prosecution *as a part of a classwide trial* of the "pattern and practice" of employment discrimination which is common to both the 222 class members who filed *no* notice of appeal and the 18 class members who filed an allegedly defective notice of appeal. (App. 26).

There is no basis for treating the 18 participating class members any differently from the 222 passive class members when it comes to the jurisdictional and procedural effect of the class representative's appeal on behalf of the class. The class representative has the right and responsibility to appeal denial of class certification on behalf of the class as a whole.[3] *Deposit*

[3]The class representative has continued to have a direct stake in the outcome of the class certification issue because as of yet she has not obtained the injunctive, declaratory or monetary relief necessary to make her whole or to end future discrimination against her. (App. 26-28). Moreover, she continues to have the same vital interest in working in a sexually neutral work environment in which women are able to rise to the heights that their talents can take them without regard to their sex. See, *Metropolitan Life Ins. Co. v. Trafficante*, 409 U.S. 205, 95 S.Ct. 364, 34 L.Ed.2d 415 (1972) (White plaintiff has personal stake and standing to seek injunctive and declaratory relief against racial discrimination aimed at blacks because of white plaintiff's interest in living in integrated environment.); *E.E.O.C. v. Mississippi College*, 626 F.2d 477, 483 (5th Cir. 1980); *E.E.O.C. v. Bailey Co.*, 563 F.2d 439, 45-54 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978); *Waters v. Hueblin*, 547 F.2d 466, 469-470 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977); *Hackett v. McQuire Bros.*, 445 F.2d 442 (3rd Cir. 1971). See generally, *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Davis*

Guaranty National Bank of Roper, 455 U.S. 326, 336-340, 100 S.Ct. 1166, 1173-1175, 63 L.Ed.2d 427 (1980); *United States Parole Commr. v. Geraghty,* 445 U.S. 388, 399-405, 100 S.Ct. 1202, 1210-1214, 63 L.Ed.2d 479 (1980); *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978); *Eisenberg v. Gagnon,* 766 F.2d 770, 784-85 (3rd Cir. 1985); *Gonzales v. Cassidy,* 474 F.2d 67, 75-76 (5th Cir. 1973). Even a putative class member can appeal the denial of the class certification order when the class representative fails to do so.[4] The timely filing of a notice of appeal by the class representative tolls the time for filing a notice of appeal by the putative class members. See, *United Airlines v. McDonald,* 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 443 (1977); *Crown, Cork & Seal Co., Inc. v. Parker,* 103 S.Ct. 2392 (1981); *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 551-552, 94 S.Ct. 756, 38 L.Ed.2d 718 (1974) [Court held that the limitation period for filing a claim was tolled for absent class members by the filing of the class complaint, and there was no need for absent class members to intervene to protect their own in-

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v. Board of School Commissioners of Mobile County, 600 F.2d 470, 475 (5th Cir. 1979). Surely if white employees have standing to challenge employment practices which adversely affect blacks, black employees also have standing to challenge such practices and female employees have standing to challenge sex discrimination against other females.

[4]In *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394, 97 S.Ct. 2464, 2468-71, 73 L.Ed.2d 423 (1977), this Court allowed a putative class member to step into the class representative's shoes and file a timely appeal of the denial of class certification on behalf of other putative class members. Her timely filing of a notice of appeal of the class certification order effectively tolled the time for appeal for the other putative class members and obviated the need for such class members to file their own separate appeals once Ms. McDonald moved to protect their interests. *Id.* 97 S.Ct. at 2468-2471. See, also *Hill v. Western Electric Co., Inc.,* 672 F.2d 381 (4th Cir. 1982) [Relying on *McDonald,* Court held that putative class members could not be expected to intervene on appeal until the original class representatives had exhausted their appellate remedies.]. Clearly, under *McDonald,* if a putative class member can toll the time for appeal and obviate the need for separate appeals by other class members, a class representative can do the same for the class she represents.

terests until it became apparent that the class representatives were not adequately protecting the class.].

For all the foregoing reasons, once the class representative, Brenda Morgan, filed a timely notice of appeal on July 3, 1984, the time limitations imposed by Federal Rule of Appellate Procedure 4 (a) (1) and 4 (a) (4) were tolled for the putative class members and there was no need for the 18 class members who had earlier filed a notice of appeal from the Rule 54 (b) judgment to file a new notice of appeal after the class representative had done so for them. Because the 18 non-prevailing class members have an identical interest to that of the other 222 class members in the appeal of the decertification of the class, the request for appellate review at the behest of the class representative served as a notice of appeal for all members of the "decertified" class and not just the 222 class members who filed no notice of appeal whatsoever.[5] Therefore, the defendant's Petition addresses a moot point by challenging the June 7, 1984 notice of appeal and ignoring the July 3, 1984 notice of appeal by the class representative.

II. The Entry Of A New Judgment Under F. R. Civ. P. 54 (b) After All Post-Judgment Motions Were Filed Recommenced The Time For Appeal As To Those Claimants And Issues Certified Pursuant To Rule 54 (b)

The defendant's reasons for granting the writ are invalidated by the plain wording and intent of F. R. Civ. P. 54 (b) and

[5]The purpose of designating a class representative is to have at least one person responsible for maintaining the requirements of jurisdiction, venue and appeal. In *McDonald* and *American Pipe, supra,* this Court was concerned with the potential problems that a rule requiring putative class members to intervene shortly after denial of certification would cause by spawning the very multiplicity of activity that Federal Rule of Civil Procedure 23 sought to avoid. 97 S.Ct. at 2470 fn. 15. 97 S.Ct. at 2470. Requiring putative class members to file separate appeals after final judgment, when a valid class representative has moved to protect their interests would recreate the identical multiplicity problem that *McDonald* and *American Pipe* sought to avoid.

F. R. App. P. 4 (a) (4). Rule 54 (b) expressly empowers a district court to enter a final appealable judgment as to less than all the parties and less than all of the issues in the case whenever the court certifies that "there is no just reason for delay and upon an express direction for the entry of judgment". F. R. Civ. P. 54 (b). That is exactly what the district court did on May 21, 1984 when it entered judgment pursuant to Rule 54 (b) as to the 18 class members who were denied back-pay in the original judgment entered April 30, 1984. (App. 55). The new judgment entered under Rule 54 (b) came *after* all post-trial motions were filed and expressly denied all such motions addressed to the claims of the 18 class members certified in the 54 (b) judgment except ones dealing with attorney's fees and costs. (App. 55-60). The new judgment entered as to these 18 class members fits *exactly* within the intent and wording of Rule 54 (b) because it involved less than all the parties and less than all the issues and was accompanied by the requisite certification that there was no just reason for delay of an appeal. (App. 55).

There is nothing within Rule 54 (b) which indicates that a district court cannot enter a Rule 54 (b) judgment as to less than all of the parties and issues after the finality of an original judgment has been suspended. Once the Rule 54 (b) judgment is entered, the time for appeal from that judgment begins to run automatically. The party against whom such a judgment is entered cannot avoid filing a notice of appeal within 30 days merely because motions as to *other* parties and issues which are not covered by the 54 (b) certificate are left pending in the district court. It is the express purpose of Rule 54 (b) to require appeal of some issues and parties while *other* issues and parties are left pending in the trial court. See e.g., *Martin v. Campbell,* 692 F.2d 112, 115 (11th Cir. 1982) ["The final judgment rule contemplates a single, unfragmented appeal, as opposed to a case carved up with part of it in the appellate court and another part alive in the district court (except where the district court enters a Rule 54 (b) direction and certificate finding fragmentation justifiable)".].

The defendant is able to cite no precedent or authority which indicates that a Rule 54 (b) judgment should be a nullity when entered while Rule 59 motions are pending as to parties and issues other than the ones contained in the Rule 54 (b) certification and judgment.[6] Contrary to the defendant's argument, the literal language of F. R. App. 4 (a) (4) does not support such a result. That Rule states on its face that "[a] notice of appeal filed before the disposition of *any* of the above motions shall have no effect". F. R. App. 4 (a) (4) (emphasis supplied). The challenged notice of appeal in the current case was not filed "before the disposition of any of the [Rule 59] motions", but instead was filed after such motions were denied as to the parties and issues contained in the 54 (b) certificate and judgment. Admittedly, there were other issues and parties still pending in the trial court after the entry of the Rule 54 (b) certificate and judgment, but it is the express purpose of the latter rule for that to occur. Appellate Rule 4 (a) (4) cannot be relied upon to change the operation of Rule 54 (b) unless the word "any" in Rule 4 (a) (4) is changed to the word "all" so that it reads as follows: "a notice of appeal filed before the disposition of *all* of the above mo-

[6]The defendant's argument that the decision in the current case is in "direct conflict" with this Court's decision in *Griggs* and *Acosta* is frivolous. Pet. p. 9. In *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982), there was no judgment or ruling disposing of any part of the Rule 59 motion at the time that the notice of appeal was filed. That is the exact opposite of the current case because here the plaintiffs only appealed *after* the applicable motion for new trial was denied and *after* a new judgment under Rule 54 (b) was entered which recommenced the running of the suspended time for appeal. Similarly, the decision in *Acosta v. Louisiana Dept. of Health*, 106 S.Ct. 2876 (1986), also involved the inapposite situation where the plaintiff appealed prior to the entry of an order denying the Rule 59 Motion. As in *Griggs*, there was never any Rule 54 (b) judgment entered in *Acosta after* the filing and denial of the Rule 59 motion. The only way that either *Acosta* or *Griggs* could apply to the situation in the current case would be if the Rule 54 (b) judgment and denial of the Rule 59 motion on May 21, 1984 were ignored. That, of course, cannot be done. All of the other decisions relied upon by the defendant suffer from the same defect. Pet. p. 10 n.3. None of them involve a situation where a Rule 54 (b) judgment is entered *after* the Rule 59 motion is denied and before the notice of appeal is filed.

tions shall have no effect".[7] The Rule, however, does not state that, but instead states that a notice of appeal filed before the disposition of "any" (i.e. one or more) of the Rule 59 motions "shall have no effect".

The word "any" renders appellate Rule 4 (a) (4) consistent with Rule 54 (b) because it permits the district court to render a final appealable judgment as to the issues and parties in one Rule 59 motion while retaining the issues and parties involved in another motion for further proceedings in the trial court. Such a result obviously satisfies the central purpose of Rule 54 (b) and satisfies the intent and literal language of appellate Rule 4 (a) (4) which merely suspends the time for appeal from an original judgment during the period prior to "the disposition of any of the [post-judgment] motions". Once "any" of the Rule 59 motions are denied and that denial is accompanied by a Rule 54 (b) certificate and judgment, the purpose and literal language of appellate Rule 4 (a) (4) is served and there is no further reason to continue the suspension of the time for appeal.[8]

This construction of Rule 54 (b) and appellate Rule 4 (a) (4) renders them consistent with one another, whereas the construction argued by the defendant places them in an irreconcilable conflict in which Rule 54 (b) has no room for operation in a post-judgment context where issues and parties

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[7]The defendant-petitioner states in its Petition that "[u]nder the plain language of Rule 4 (a) (4), a notice of appeal filed before the disposition of *any and all* Rule 59 (e) motions 'shall have no effect', and a new notice of appeal 'must be filed' ". Pet. p. 8. (emphasis supplied). The defendant can point to nothing in the plain language of Rule 4 (a) (4) which says "any and all". The defendant's argument takes an unwarranted license with the Rule by inserting the word "all" where it does not appear.

[8]The defendant argues that the policy against piecemeal appeals embodied in 28 U.S.C. Section 1291 supports its position. Those policies, however, are modified by the policy and purpose of Rule 54 (b) which expressly contemplates entry of a final judgment as to less than all of the parties and less than all of the issues. When the requisite certification that "there is no just reason for delay" is made by the district court under Rule 54 (b), the policies against piecemeal appeals is adumbrated.

other than those certified in the 54 (b) judgment are left pending in the district court by way of separate Rule 59 motions. The defendant disavows that its argument has this effect and argues that "Rule 54 (b) would still have full play in post-trial proceedings" in the situation involved in *Behring Intl., Inc. v. Imperial Iranian Air Force,* 699 F.2d 657 (3rd Cir.), *reh'g denied,* 712 F.2d 45 (3rd Cir. 1983). The situation in *Behring,* however, is inapposite to that in the current case because there the Rule 54 (b) judgment was entered *before* the Rule 59 motion was filed which suspended the time for appeal from the latter judgment. In the current case, of course, the exact opposite occurred when the Rule 54 (b) judgment was entered *after* the Rule 59 motion was filed and denied. The refusal to recognize this crucial distinction is a defect in the defendant's argument that is common to all of the precedent it relies upon. See footnote 6 *supra.*

Even if this distinction did not render the decision in *Behring* useless for present purposes, the decision plainly states that a notice of appeal filed before a denial of any Rule 59 motion is valid "if the appeal and the Rule 59 motion [do not] raise identical or closely related legal issues in the same factual context".[9] The Court of Appeals in the current case, of course, held that the motions which remained pending after the Rule 54 (b) judgment involved issues *unrelated* to the parties and issues certified in the 54 (b) judgment. (App. 4-6). The only thing left pending after the Rule 54 (b) judgment which was addressed to the 18 non-prevailing class members was the defendant's motion requesting fees and costs against such class members and opposing the assessment of fees and costs against it for time spent by the plaintiffs' attorneys litigating such losing claims. (App. 58-59). The Court of Appeals correctly

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[9]The Court in *Behring* stated that it "express[ed] no opinion as to whether F. R. Civ. P. 4 (a) (4) and *Griggs* might permit a party to appeal a decision certified pursuant to Fed. R. Civ. P. 54 (b) while the opposing party's Rule 59 motion was pending if the appeal and the motion did not raise common legal issues in a shared factual [context]". *Id.* 712 F.2d at 47 n.2.

held that a motion disputing the assessment of fees and costs was collateral to the question of whether the 18 plaintiffs were the victims of employment discrimination and could not lead to the appellate court and the trial court simultaneously reviewing the judgment against the 18 class members on the latter question. (App. 4-6). See, *White v. New Hampshire Dept. of Emp. Sec.*, 455 U.S. 445, 451-454, 102 S.Ct. 1162, 1166-1168, 71 L.Ed.2d 325 (1982) ("Consistently with this original understanding, the federal courts generally have invoked Rule 59 (e) only to support reconsideration of matters properly encompassed in a decision on the merits. *** By contrast, a request for attorney's fees under Section 1988 raises legal issues collateral to the main cause of action — issues to which Rule 59 (e) was never intended to apply".); *Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980).

In so holding, the Court below specifically relied upon the Advisory Committee Note which states that "it would be undesirable to proceed with the appeal while the district court has before it a motion *the granting of which would vacate or alter the judgment appealed from*". App. 4 [quoting from F. R. Civ. P. 4 (a) (4) Advisory Committee Note with emphasis supplied by the Court below]. The Court of Appeals concluded that the mere fact that a motion concerning attorney's fees was pending at the time that the Rule 54 (b) judgment as to *other issues* was entered was not sufficient to suspend the time for appealing from the Rule 54 (b) judgment because the motion concerning attorney's fees and expenses was not one which, in the words of the Advisory Committee and the Court below, " 'would vacate or alter the judgment appealed from' ". (App. 4). That is certainly true in the current case. The 18 plaintiffs appealed from the underlying judgment which held that they were not the victims of sexual discrimination in employment opportunities. The defendant's effort to have attorney's fees and costs assessed against such plaintiffs and not against itself was not something that "would vacate or alter the judgment appealed from". (App. 4). The "judgment appealed from" was the ruling that the 18 class members were

not the victims of sex discrimination. There was absolutely nothing left in the trial court after the June 7, 1984 notice of appeal which could have possibly overturned the latter judgment or lead to simultaneous review in the appellate and trial courts.[10]

The Advisory Committee Note to Appellate Rule 4 (a) (4) relied upon by the Court of Appeals is consistent with Rule 54 (b) because they both recognize that there are some issues which should not suspend the time for appeal as to other unrelated issues. The defendant offers no plausible reason for doubting the wisdom of the Court of Appeals in holding that a motion directed to attorney's fees and costs is one of those issues which should not interrupt the finality of a judgment on the merits of the case. (App. 4-7). Attorney's fees are part of the "costs" in a Title VII case such as the current one. (App. 5-6). F. R. Civ. P. 58 expressly states that "[e]ntry of the judgment shall not be delayed for the taxing of costs". There is substantial other precedent for refusal to allow a dispute over fees and costs to suspend an otherwise final judgment which is recited in the Court of Appeals decision hereinbelow. (App. 5-6). Not the least of such authority is Rule 54 (b) which expressly empowers the district court to enter an appealable judgment as to less than all the issues or parties.

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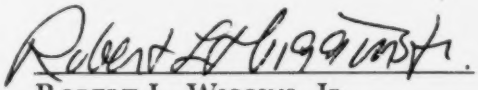
[10]It would be bizarre indeed if the defendant's motions were capable of overturning the judgment on the merits entered *in favor of the defendant* on the 18 class members' claims. The defendant is merely torturing the English language and all notions of logic to suggest that a motion addressed solely to the question of who is entitled to attorney's fees interposes the possibility that the underlying judgment that the 18 class members were not the victims of sex discrimination may be vacated or overturned as a result of such a motion. Any semblance of doubt regarding such a possibility was removed when the district court denied the 18 plaintiffs' direct challenge under Rule 59 to the judgment against them and certified under Rule 54 (b) that there was no longer "any just reason for delay" of an appeal by such plaintiffs from the denial of their Rule 59 motions and the original judgment against them.

CONCLUSION

This case is not one that should be reviewed by the Court. The Court of Appeals simply applied the obvious intent and effect of F. R. Civ. P. 54 (b) and F. R. App. 4 (a) (4) by permitting the 18 plaintiffs to file a separate Notice of Appeal *after* the denial of the Rule 59 motion directed to the merits of the decision that they were not the victims of sex discrimination and *after* that denial was embodied in a new judgment entered pursuant to F. R. Civ. P. 54 (b) as to less than all the parties and less than all the issues. This ruling does not involve a conflict with prior precedent, but instead involves a mundane application of the federal rules of procedure which does not merit further belaboring at the behest of a defendant who must account for the "pervasive and overt" sexual discrimination it practiced against the class on remand regardless of the outcome of the challenge to 18 of the 240 members of that class in the current proceedings. The unchallenged Notice of Appeal by the class representative renders the entire question presented by the Petitioner moot.

Respectfully submitted,



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